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Supreme Court, U.S.

FILED

MAY 4 1987

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1986

KENNETH WALTON and JEAN WALTON, Petitioners

v.

STATE OF CALIFORNIA.

*On Petition for Writ of Certiorari
To the Appellate Department of the
San Diego County Superior Court in the
State of California*

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

In an obscenity investigation, may films be seized with a warrant which does not specifically identify individual items thought to be obscene but allows for confiscation of any material described only in general, categorical terms?



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In the Supreme Court of the United States

October Term, 1986

KENNETH WALTON and JEAN WALTON, Petitioners

v.

STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI

The petitioners Kenneth Walton and Jean Walton respectfully pray that a writ of certiorari issue to review the judgment of the Appellate Department of the San Diego County Superior Court, State of California, rendered January 29, 1987.

OPINIONS BELOW

The judgment of the Appellate Department of the San Diego County Superior Court affirming the lower court is unreported and was rendered without opinion; it is included in the appendix at A-1. The oral decision of the Municipal Court reviewed by the Appellate Department is included in the appendix at A-2.

The orders of the California Court of Appeal, Fourth District, Division One and the California Supreme Court declining to review the case are included in the appendix at A-5 and A-6.

The March 2, 1987 order of the Appellate Department denying rehearing in the case is included in the appendix at A-7.

JURISDICTION

The judgment of the Appellate Department of the San Diego County Superior Court was rendered on January 29, 1987. A timely petition for rehearing was denied March 2, 1987. This petition is filed within 60 days of that date and is timely. This Court's jurisdiction is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:
"Congress shall make no law . . . abridging the freedom of speech . . ."

United States Constitution, Amendment 4:
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioners Kenneth Walton and Jean Walton have been convicted on a guilty plea of possessing obscene films for distribution in violation of California Penal Code section 311.2, subdivision (a). The case concerned certain video tapes located in and seized from the Waltons' home during a search conducted with a warrant.

In the San Diego County Municipal Court, the Waltons made a motion for return of property and to suppress the seized video tapes as evidence. The motion was denied and became the subject of an appeal to the Appellate Department of the San Diego County Superior Court.

By order dated January 29, 1987, the Appellate Department affirmed denial of the motion without opinion and rehearing was denied on March 2, 1987. Review thereafter was denied by the California Court of Appeal and the California Supreme Court.

The facts underlying the search and seizure are these:

On May 1, 1986, San Diego County Deputy Sheriff Robert M. Hoxter applied for a search warrant. The affidavit supporting the application recounts the following:

An investigator named Ackerman associated with the district attorney's office in Wallowa County, Oregon was conducting an investigation into "pornography." A suspect named Styles, contacted somewhere in the state of Michigan, gave Ackerman

an address for Mr. and Mrs. Walton in Escondido, California who he said were interested in sexual activity with animals. In January, 1986, Ackerman wrote the Escondido couple from Oregon and expressed his interest in bestiality. Mr. and Mrs. Walton responded by letter in late January.

Ackerman later obtained the Waltons' home telephone number. On April 20th he telephoned the Waltons. He reported Mr. Walton said he and his wife had had sex with animals and that they had video tapes showing animal sex. Ackerman also reported that during a telephone conversation with Mrs. Walton, she admitted having sex with animals and indicated they had video tape showing bestiality. Ackerman called Mrs. Walton again in April 28, 1986 and reported that she stated she and her husband would bring their tapes of animal sex to Oregon to copy and trade with Ackerman.¹

Based on this showing, a warrant was issued to search the Waltons' home for the following:

- a. Any writing bearing the name Kenneth W. Walton and/or Jean A. Walton.
- b. Any photographs or video recording medium depicting the "suspect/suspects, in an act of

¹ - The balance of the affidavit recites at length Deputy Hoxter's training and experience in obscenity investigations and his beliefs regarding the habits, customs, and lifestyles of child molesters, pornographers, and persons involved in bestiality.

sexual assault upon an animal."

c. Any photographs or video recording medium constituting "obscene matter" involving sexual activity with animals described in paragraph b.

d. All exposed but undeveloped rolls of film.

e. Any writings with names or addresses of persons indicating an interest in the sexual assault of animals.

f. Any items showing dominion and control over the Waltons' home.

The search was conducted on May 2, 1986 by Deputy Hoxter and several others. Sixty-two video tapes were seized; none of the tapes were viewed before seizure and at least 39 proved not to contain depictions of bestiality. Numerous photographs and slides were taken, most not involving bestiality. Additionally, two video cassette players and other video camera equipment was taken along with numerous other items. A portion of the seized property was returned to the Waltons as a result of an agreement reached at the motion hearing.²

² The only justification for the search and seizure offered by Deputy Hoxter and the prosecution was violation of the state obscenity laws. Petitioners were only charged with violation of the obscenity statute. Any possible criminal violation for sexual activity with animals was not considered cause for search by the police or prosecution.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to decide an important question dividing the federal circuits and the state courts: whether an obscenity warrant must identify individual obscene items to be seized or whether a generic description of obscene expression is sufficiently specific for First and Fourth Amendment purposes.

The warrant used to seize films from the Waltons' home did not identify any individual films either by name or by specific description. Instead, the warrant purported to authorize seizure of any pictures or films the executing officers considered to fall within a general category of sexually oriented expression. The terms of the warrant did not even limit the officers' discretion to seize material they deemed "obscene."³

The manner in which the warrant was executed indicates the officers did not feel constrained to seize only material containing scenes showing

³ Paragraph C of the warrant authorized seizure of any obscene material containing scenes showing a "sexual assault upon an animal," but Paragraph B authorized seizure of any material showing a "sexual assault upon an animal" without regard to the possible obscenity of the material. Since the only purpose for the warrant was to gather evidence of state obscenity violations, the description of items to be seized exceeded the legitimate scope of the investigation.

bestiality.⁴ Sixty-two video tapes were seized from the Waltons' home on the purported authority of the warrant. None of the video tapes were viewed before being seized. (RT 16) Deputy Hoxter who led the search team admitted he did not know the contents of any of the videos when he decided which of them to take; instead, he confiscated all video tapes even when the boxes were unmarked and the tapes were apparently blank (Exhibit F-2) or when the tape boxes affirmatively indicated the film did not show bestiality (Exhibit F-1). (RT 13-15) Even though Deputy Hoxter indicated he felt the warrant only authorized seizure of bestiality depictions, he seized a collection of slides after viewing six or eight of the total which he discovered did *not* show bestiality; the decision to seize was based on what was described as a "possibility" other unexamined slides showed such conduct. (RT 24-26). He seized a stack of

⁴ Films or books containing a single description or depiction of bestiality are not necessarily obscene since the expression must be evaluated "as a whole" for serious value and patent offensiveness, *Miller v. California*, 413 U.S. 15, 24 (1973); a film showing bestiality may raise serious questions whether the depiction appeals to a prurient interest in sex or merely a curiosity with the bizarre. And in fact, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 applied stringent First and Fourth Amendment requirements to a warrant for seizure of obscenity containing scenes of bestiality according to the warrant and affidavit in the case reprinted in *United States v. Guarino*, 729 F.2d 864, 881-885 (1st Cir., en banc, 1984).

magazines (Exhibit D), *none* containing any depictions of bestiality.

Confiscation of films and other expressive material from the Waltons' home implicated First as well as Fourth Amendment concerns since a seizure of presumptively protected expression results in a restraint of free speech. Accordingly, the Court has recognized "particularized rules applicable to searches for the seizure of allegedly obscene films, books and papers," *Maryland v. Macon*, 472 U.S. 463, 468 (1985), including a requirement that no seizure of presumptively protected expression may occur without a warrant. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); *Heller v. New York*, 413 U.S. 483 (1973). And *Roaden*, 413 U.S. at 504 reiterated the rule from *Stanford v. Texas*, 379 U.S. 476, 485 (1965) that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."

Speiser v. Randall, 357 U.S. 513, 525 (1958) explained the reason for "special constraints" and "scrupulous exactitude" when the power of search and seizure is used as an "instrument for stifling liberty of expression," *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961), since "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn . . . [and] the separation of legitimate from illegitimate speech calls for . . . sensitive tools."

A prime "sensitive tool" is a judicial determination of probable obscenity before expression straying outside First Amendment protection can be suppressed by seizure. Judicial supervision of any suppression of free expression is well recognized. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963), requiring a judicial decision to find the "dim and uncertain line" between protected and unprotected expression; *Freedman v. Maryland*, 380 U.S. 51, 58 (1965), requiring judicial determination before imposition of a prior restraint of suspected obscenity.

While *New York v. P. J. Video, Inc.*, 475 U.S. ____ (1986) rejected the notion a higher standard of probable cause applies to seizure of possibly obscene expression, the case embraces the holding of *Heller v. New York, supra*, 413 U.S. at 492-493 that a neutral magistrate must make a prior judicial determination of probable obscenity before a seizure may occur.

No determination of the probable obscenity of any specific films or pictures at the Waltons' home was made by the magistrate since the content of individual items was unknown. Therefore, the warrant did not designate any identified films or photographs to be seized, but left the evaluation of what constituted illegal expression to the executing officers. This is precisely the flaw found in the invalid warrant of *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1970).

The constitutional requirement a warrant particularly describe the things to be seized must be strictly applied when alleged obscenity is

confiscated. A warrant to seize items thought to be obscene cannot describe the items in generic terms but must identify each separate article by title or other unique characteristic. Otherwise there is no assurance the safeguards of *Heller v. New York*, *supra*, an "independent judicial determination of probable cause prior to issuing the warrant" with a searching focus on the question of obscenity (413 U.S. at 488-489), has been satisfied.

This Court has never sanctioned seizure of presumptively protected but allegedly obscene material with a warrant that did not specifically identify the individual items considered obscene. Since an executing officer is not deemed qualified to determine whether individual items may or may not be obscene, *Lee Art Theater v. Virginia*, 392 U.S. 636, 637 (1968), a warrant directing seizure of all "obscene publications" without naming individual books is invalid, *Marcus v. Search Warrant*, *supra*, 367 U.S. 717, as is a warrant to seize films and magazines "similar" to specifically identified obscene items. *Lo-Ji Sales, Inc. v. New York*, *supra*, 442 U.S. 319.

Certiorari should be granted to consider the important question of whether the requirement for a prior judicial determination of probable obscenity is satisfied when a warrant has been issued which designates no individual items for seizure but gives authority to police executing the warrant to evaluate the content of books and films and exercise discretion to determine what should be taken.

Federal circuit courts have reached differing conclusions on the question whether a generic warrant is permitted in an obscenity investigation. *United States v. Guarino*, 729 F.2d 864 (1st Cir., en banc, 1984) held a warrant to seize obscenity without identifying individual items was invalid while *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir., 1984) approved a similar generic warrant for seizure of items suspected of being obscene. See also *Sovereign News Co. v. United States*, 690 F.2d 569, 576 (6th Cir., 1982); *United States v. Sherwin*, 572 F.2d 196 (9th Cir., 1977); and *United States v. Nader*, 621 F.Supp. 1076 (D.C. D.C., 1985) compared with *Matter of Property, etc.*, 644 F.2d 1317 (9th Cir., 1981); and see *United States v. Marti*, 421 F.2d 1263 (2nd Cir., 1970). Similarly, some state courts have held that generic obscenity warrants satisfy the particularity requirement of the Fourth Amendment, e.g., *Clifford v. State*, 474 N.E.2d 963 (Ind. Sup. Ct., 1985); *Century Theaters, Inc. v. State*, 625 S.W.2d 511 (Ark. Sup. Ct., 1981); *Village Books v. State*, 323 A.2d 698 (Md. Ct. Spec. Apls., 1974), while other state courts have required obscenity warrants to identify individual items. E.g. *Aday v. Superior Court*, 362 P.2d 47 (Cal. Sup. Ct., 1961); *People v. Superior Court (Freeman)*, 534 P.2d 393 (Cal. Sup. Ct., 1975); *Jefferson Parish v. Bayou Landing*, 350 So.2d 158 (La. Sup. Ct., 1977); *Anthony v. Carter*, 541 S.W.2d 157 (Tenn. Sup. Ct., 1976).

Certiorari is appropriate to consider and resolve these conflicts.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

April, 1987

Respectfully submitted,

THOMAS F. HOMANN

A-1

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
Case No. CR 82344**

**The People of the State of California,
Plaintiff,**

v.

**Kenneth Walton and Jean Walton,
Defendants.**

Order, January 29, 1987

**The judgment of the lower court is
unanimously affirmed.**

**/s/Ben W. Hamrick, P.J.
Gilbert Nares, J.
Laura Hammes, J.**

**IN THE MUNICIPAL COURT
NORTH COUNTY JUDICIAL DISTRICT
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA
Case No. H 27993**

**The People of the State of California,
Plaintiff,**

v.

**Kenneth Walton and Jean Walton,
Defendants.**

Transcript, pages 38-40, June 20, 1986

The Court: Usually in the obscene film cases, we are dealing with commercially-produced films that contain a mixture of socially redeeming scene and scene that are not socially redeeming. Here we are dealing with a different type of film where I believe at the time that the warrant was executed and still at this time, that certain things can be described that exceed the limits of acceptable conduct, aa least in my belief of the standards of the community, and not particularly the standards of the community but acceptable conduct does not encompass sexual conduct with animals. I also think that that type of conduct has no redeeming social value, in my opinion.

I think in regard to the descriptions set forth in the affidavit is sufficient to establish probable cause for the seizure of the films that are depicted in the warrant.

The next step, getting to the point raised by Mr. Williams is, did the officers go well beyond the intent of the search warrant. Here I think you must measure the officer's act in the confines of what is reasonable and what is unreasonable. The problem facing an officer, any officer, this officer or anyone else, is he may see a film and the box says, "Mary Poppins," but what is inside or what is in the last half of the film, no one knows until you sit down and view the film from one end to the other.

Because of the number of films that we are dealing with, two, three, or four or five films, I think it would have been reasonable for him to sit down and look at those films before seizing them. When we are talking about the potential of the number of hours involved in this particular case, I think it would be -- the standards that we set them as requiring the officer to review all those films before taking them would be unreasonable. I think it was reasonable in this case, based on two things.

One. Evidence he did find that there was some films involving bestiality.

Two. The comment which was not objected to, and I assumed to be a spontaneous comment, "Take them all," or words to that effect, that comment combined with what was viewed, plus the titles would be reasonable as far as the officer is concerned to take them all for later viewing.

The equipment. Part of the basis for the

search warrant was to establish potential for a felony. Possession of the films, as so aptly pointed out, is, at best, a misdemeanor. A felony, if one existed, came from the possible distribution. Therefore, the items necessary to establish either original production, reproductions, or a number of quantity of a certain film, implying production or whatever evidence a trier of fact may find necessary to establish whether there is distribution, would be necessary and reasonable. I think it is obvious from what we have heard from the testimony that there are some items that were taken that later was determined to be not necessarily related to any criminal activity.

A-5

**COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
Case No. D005949**

**Kenneth Walton, et al.,
Petitioners,**

v.

**Superior Court, etc.,
Respondent;**

People, Real Party in Interest.

Order, March 11, 1987

THE COURT: The petition for writ of mandate or prohibition and request for stay has been read and considered by Justices Work, Butler and Todd. The petition is denied as there is no showing the appellate department abused its discretion in failing to certify the matter to this court. (Cal. Rules of Court, rule 63.)

**/s/Work
Acting Presiding Justice**

A-6

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

In Bank

Case No. 4/1 D005949 - S000322

**Kenneth Walton, et al.,
Petitioners,**

v.

**Superior Court, etc.,
Respondent;**

People, Real Party in Interest.

Order, March 23, 1987

**Application for stay and petition for review
DENIED.**

**Lucas
Chief Justice**

A-7

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
Case No. CR 82344**

**The People of the State of California,
Plaintiff,**

v.

**Kenneth Walton and Jean Walton,
Defendants.**

Order, March 2, 1987

**Appellant's Petition For Rehearing and
Application For Certification to Court of Appeal is
denied.**

**/s/Ben W. Hamrick, P.J.
Gilbert Nares, J.
Laura Hammes, J.**

JUL 22 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH WALTON and JEAN WALTON,
Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari
To the Appellate Department of the
San Diego County Superior Court in
the State of California

BRIEF OF RESPONDENT IN OPPOSITION

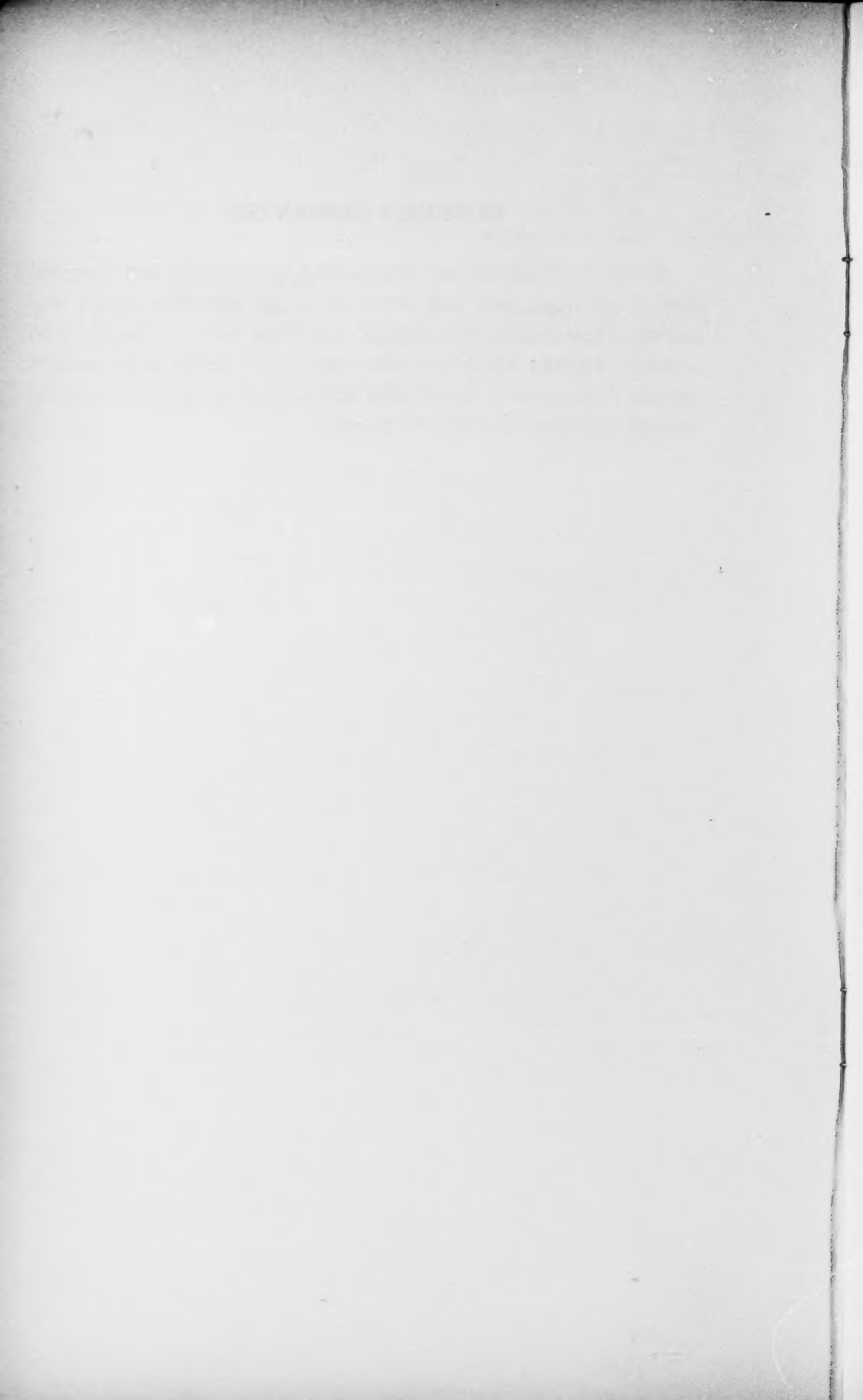
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QUESTION PRESENTED

In an investigation into production, possession, and distribution of photographic and video materials depicting people engaging in sexual acts with animals, may films be seized pursuant to a search warrant which describes items to be seized as those containing depictions of specifically described oral, anal, and genital sex acts between animals and people?



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California Penal Code Section 311.2(a) A-1

APPENDIX B

In the Municipal Court, North County Judicial District
County of San Diego, State of California Search War-
rant No. 67-86 B-1

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No. 86-1767

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH WALTON and JEAN WALTON,
Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari
To the Appellate Department of the
San Diego County Superior Court in
the State of California

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

In an unreported decision, the Appellate Department of the San Diego County Superior Court unanimously affirmed the decision of the Municipal Court of the North County Judicial District of San Diego County denying petitioners' pretrial motion for return of property seized pursuant to search warrant. The California Court of Appeal, Fourth District, Division One, and the California Supreme Court declined to review the case.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 United States Code section 1257, subdivision 3.

STATUTES INVOLVED

The provisions of the First and Fourth Amendments to the United States Constitution are adequately set forth in the Petition for Writ of Certiorari, page 2.

The text of California Penal Code section 311.2(a) is set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

In a complaint filed in the Municipal Court, North County Judicial District of San Diego County, Kenneth Walton and Jean Walton, petitioners, were charged with offering to distribute, distributing, and exhibiting to others obscene matter, a misdemeanor. (Cal. Pen. Code, § 311.2(a); appendix A.)

On June 20, 1986, petitioners' pretrial motion for return of property was denied in the Municipal Court of the North County Judicial District in San Diego County, State of California.¹

On January 29, 1987, the judgment of the Municipal Court was unanimously affirmed by the Appellate Department of the San Diego County Superior Court.

On March 2, 1987, the Appellate Department of the San Diego County Superior Court denied petitioners' Petition for Re-hearing and Application for Certification to the Court of Appeal.

On March 11, 1987, the California Court of Appeal, Fourth Appellate District, Division One, denied petitioners' Petition for Writ of Mandate or Prohibition and Request for Stay.

On March 23, 1987, the California Supreme Court denied petitioners' Application for Stay and Petition for Review.

On March 31, 1987, in the Municipal Court of the North County Judicial District of San Diego County, petitioners pleaded guilty to

¹ The text of the rulings from the lower courts is adequately set forth in the Petition for Writ of Certiorari, appendices A-1 through A-7.

one count of California Penal Code section 311.2 (possession of obscene matter with intent to exhibit to another), a misdemeanor.

STATEMENT OF FACTS

On May 1, 1986, San Diego County Deputy Sheriff Robert M. Hoxter applied for a search warrant (appendix B) to search petitioners' home for evidence of their involvement in possession, production, and distribution of materials involving sex with animals. The affidavit supporting the application for the warrant indicated Hoxter's experience as an investigator, his knowledge of sex with animals pornography production and, specifically, the following information which was the result of a combined agency investigation into animal pornography.

Deputy Hoxter had received information from Bruce Ackerman, an investigator for the Wallowa County District Attorney's Office, Wallowa, Oregon, that during his investigation involving a Michigan pornographer, Ackerman discovered that petitioners appeared to be involved in the production and trading of films involving sex with animals.

In the search warrant affidavit, Officer Hoxter provided, among other information, the following information gleaned from Investigator Ackerman:

1. Ackerman had been given the names and address of the petitioners by a known pornography distributor in Michigan.
2. Ackerman had spoken over the phone with a man identifying himself as Kenny Walton (petitioner) who told Ackerman that:

a) Ken Walton had had oral sex with stallions (describing the taste and feel of the horse's sex organ).

b) Walton's wife had sex with stallions (though could not get the full length of the horse's penis in her).

c) Walton's wife had had sex with several Arabian stallions.

d) Walton owned a male dog and that both he and his wife have had sex with the dog.

e) Walton said he had a video tape of his wife having sex with a stallion.

f) Walton had many other tapes of animal sex.

g) Walton's address was 1039 Hoover Street, Escondido, California.

3. Ackerman had spoken over the phone with a woman identifying herself as Jean Walton (petitioner) who told him:

a) She had had sex with about four stallions.

b) She could insert about half of a 20-inch horse penis inside her vagina.

c) She likes having oral sex with stallions.

d) She and her husband had had sex with the dog.

e) They have a video tape of her having sex with the dog.

f) They have two portable video tape machines.

g) They would bring their tapes of animal sex to Oregon (Ackerman's alleged ranch) to copy and trade with Ackerman.

In addition to the information from Ackerman, Hoxter informed the magistrate that based on his training and experience, people involved in sex with animals and films of the same usually keep such films at home, along with correspondence information on those people they communicate and trade with.

In his affidavit supporting the warrant, Hoxter included copies of the written correspondence between Ackerman and petitioners which focused entirely on sex with animals.

Based on the above, a search warrant was issued for petitioners' home, to search for and seize papers and correspondence bearing petitioners' names, exposed but undeveloped film, dominion and control items, and photographs, negatives, slides, video cassettes or any other photographic or video recording medium depicting suspects in acts of sexual assault on animals, specifically human-genital to animal-genital contact, human-oral to animal-genital contact, animal-oral to human-genital contact, human-genital to animal-

anal contact, animal-genital to human-anal contact, human-oral to animal-anal contact.²

The search was conducted on May 2, 1986, by Deputy Sheriff Hoxter and several other officers.

During the search, the officers discovered over 60 video tapes, many with labels indicating titles such as "Animal Love #3," "Barnyard Ball," "Pony and Jean Walton... Jean Walton and Sausage," "Jean Walton and Pony . . .," "Pony with Jean Walton," etc.

Deputy Hoxter instructed another officer at the scene to review the titles of the tapes to determine if the content of the tapes involved bestiality. At that moment, petitioner Kenneth Walton, who was standing nearby, made the unsolicited statement, "You'll want to take all of them!", while waving his arm in the direction of a tape cabinet.

The officers then seized at least 60 video tapes that, according to petitioner's unsolicited statement, were about sex with animals. Rather than moving in with petitioners for several days while they viewed the seized tapes, the officers took all the tapes and viewed

² In their Petition for Writ of Certiorari, petitioners completely omitted the particular and detailed description contained in section "B" of the warrant, which confined the officers to seizing materials that contained depictions of the above-described multiple variations of sexual activity between humans and animals. Likewise, petitioners excised from their representation of section "C" of the warrant another particular description of items to be seized which specified "...depicting the suspect/suspects, in an act of sexual assault upon an animal protected by Penal Code section 597f, as described in Penal Code section 286.5," Nor did petitioners append a recitation of the complete provisions of the warrant. In light of petitioners' claim that the warrant failed to specifically identify individual items to be seized (Petition for Writ of Certiorari, "Question Presented," p. i), petitioners' omission of the specific descriptions contained in the warrant makes petitioners' incomplete description of the provisions of the warrant (Petition for Writ of Certiorari, pp. 4-5) a questionable representation to the Supreme Court of the United States.

them at the police department. Tapes not containing sex with animals were later returned to petitioners.³

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the Appellate Department of the San Diego Superior Court fully considered and correctly decided the issue at bar, relying on prior decisions of this court, including *New York v. P. J. Video, Inc.* (1986) 475 U.S. ____, which are controlling. Moreover, the Federal Circuit Court decisions that petitioners allege are in conflict differ only on facts, and are in fact consistent in application of the concepts set forth in previous, controlling decisions of this Court.

ARGUMENT

I

PRIOR DECISIONS OF THIS COURT ARE CONTROLLING.

This Court has promulgated and consistently applied three main principles in analyzing searches and seizure of obscene materials.

First, no seizure of presumptively protected expression may occur without a warrant. (*Roaden v. Kentucky* (1973) 413 U.S. 496, 504.)

Second, a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may

³ Many of the tapes returned consisted of subject matter including sexual bondage, "punishment," body part piercing, urination in people's mouths, and sex with vegetables. Although many may have been arguably obscene, they were nonetheless returned (along with the sex trapeze and latex horse penis) in light of the fact they had not been anticipated or described in the search warrant.

focus searchingly on the question of obscenity. (*New York v. P. J. Video, Inc.*, *supra*, 475 U.S.____ citing *Marcus v. Search Warrant* (1961) 367 U.S. 717, 732.)

Third, the warrant issued must particularly describe the things to be seized. (*Roaden v. Kentucky*, *supra*. 413 U.S. 496, 504 quoting *Stanford v. Texas* (1965) 379 U.S. 476, 485.)

These three requirements were met in the case at bar. The officers applied for a warrant to seize the films. The affidavit contained detailed descriptions (provided by petitioners to Ackerman) of the human-animal sex acts depicted on video tapes sought to be seized. The warrant particularly described the specific human-animal sex depictions to be seized.

II

FEDERAL CIRCUIT COURT DECISIONS ARE NOT IN CONFLICT, AND APPLY PRINCIPLES FROM THE CONTROLLING DECISIONS OF THIS COURT.

While decisions in the Federal Circuit Courts may differ in their conclusions regarding the validity of specific seizures based on the facts in individual cases, they do not conflict in their application of the three fundamental obscenity seizure principles above.

See, for example, *United States v. Guarino* (1st Cir. 1984) 729 F.2d 864, 865 (warrant invalid that failed to particularly describe items to be seized when only description provided was "a quantity of obscene materials"). See also *Sequoia Books, Inc. v. McDonald* (7th Cir. 1984) 725 F.2d 1091, 1093 (warrant upheld that authorized seizure of materials containing depictions of "cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other person," etc.). See *Matter of Property, Etc.* (9th Cir. 1981) 644 F.2d 1317, 1319 (warrant upheld which commanded officers to seize "those books, magazines, and films" which depicted specific sex acts described in an attached affidavit as scenes of seven and eight year-olds engaged in nude gay and straight sexual activity, scenes of sexual intercourse, fellatio, cunnilingus, group sex, golden showers, bisexual sex, [etc.]).

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied as their argument is without merit, and because the issue was considered and correctly decided by the lower court based on prior decisions of this Court, which are controlling and have been consistently applied in Federal Circuit Court decisions.

Dated: July 6, 1987

Respectfully submitted,

EDWIN L. MILLER, JR.

District Attorney

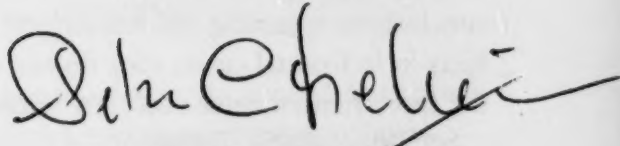
PETER C. LEHMAN

Deputy District Attorney

DAVID A. WILLIAMS

Deputy District Attorney

Signed:

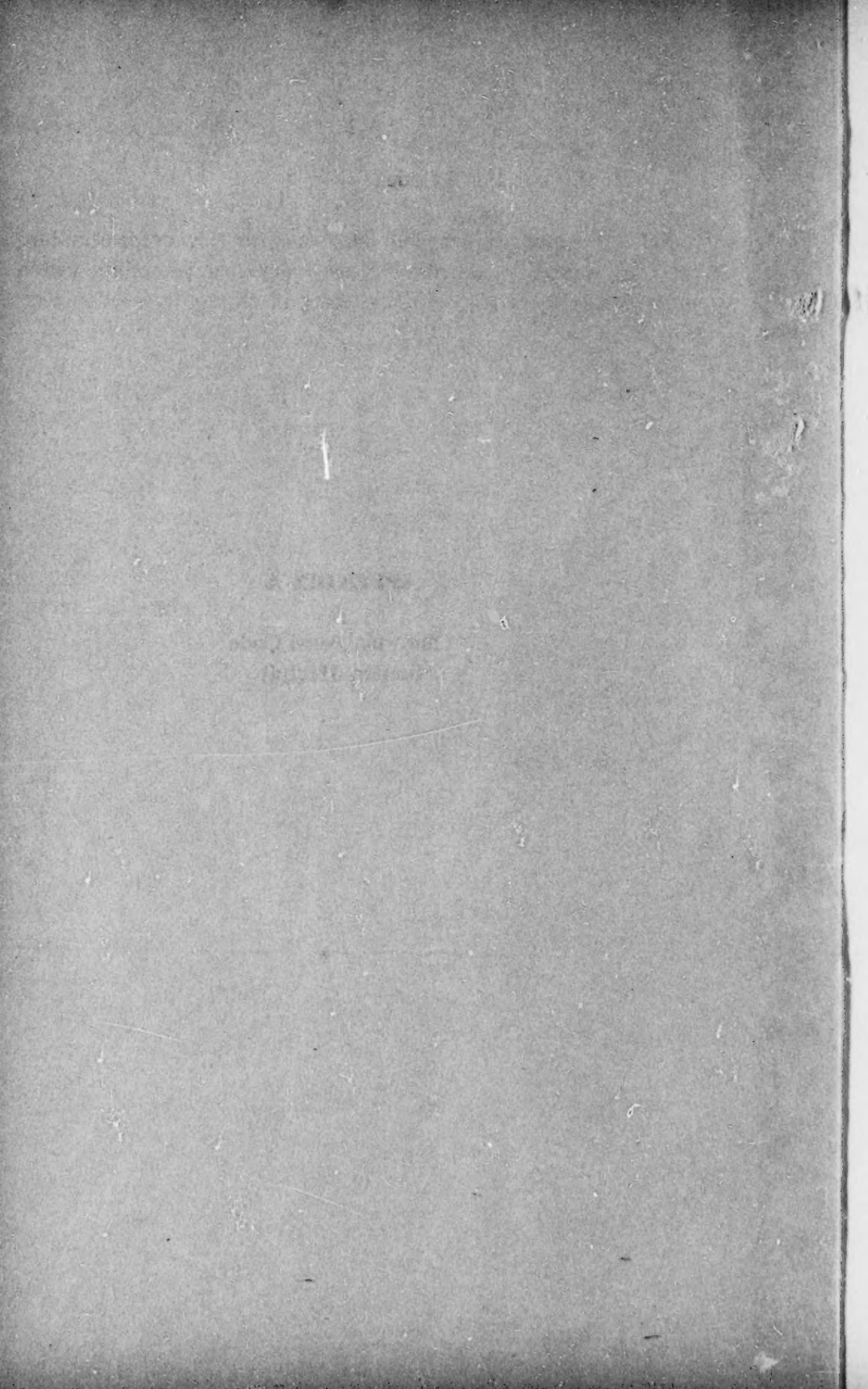
A handwritten signature in dark ink, appearing to read "Peter C. Lehman", with a long horizontal flourish extending to the right.

PETER C. LEHMAN

Deputy District Attorney

Attorneys for Respondent

APPENDICES



"California Penal Code:

§ 311.2. Sending or bringing into state for sale or distribution; printing, exhibiting, distributing, exchanging or possessing within state; matter depicting sexual conduct by minor; transaction with minor; exemptions

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanor. If the person has previously been convicted of any violation of this section, the court may, in addition to the punishment authorized to Section 311.9, impose a fine not exceeding fifty thousand dollars (\$50,000)."



APPENDIX B

**IN THE MUNICIPAL COURT, NORTH COUNTY
JUDICIAL DISTRICT COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA
Search Warrant No. 67-86**

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

IN THE MUNICIPAL COURT, NORTH COUNTY
JUDICIAL DISTRICT COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA

SEARCH WARRANT
NO. 67-86

The People of the State of California, to any sheriff, constable, marshal, policeman, or any other peace officer in the County of San Diego:

Proof, by affidavit, having been this day made before me by ROBERT M. HOXTER, a peace officer and a detective employed by the San Diego County Sheriff's Department, that there is substantial probable cause for the issuance of the search warrant, you are, therefore, commanded to make search at any time of the day, good cause being shown therefor, of the premises located at and described as follows:

The premises to be searched is located at 1039——Hoover [H.E.] St., Escondido, California, which is a single story residence constructed of light brown (chamois) wood siding and dark brown wood trim. The premises front door faces east and the front yard is fenced in wrought iron with brown brick corner pillars. The premises to be searched has a brown asphalt shingle roof and the numerals 1039 are embedded in the south/east corner pillar at the north edge of the driveway. The designated premises includes all rooms, attics, garages, storage areas, closets and containers and detached outbuildings at and assigned to said premises.

You are commanded to search for the property described as follows:

B-2

- A. Papers, letters, envelopes, forms, lists, records, journals, address books, and writings, as that term is defined in the California Evidence Code, bearing the name KENNETH W. WALTON and/or JEAN A. WALTON, or any variation thereof.
- B. Photographs, negatives, slides, video cassettes, or any other photographic or video recording medium depicting the suspect/suspects, in an act of sexual assault upon an animal protected by Penal Code Section 597f, as described in Penal Code Section 286.5, for the purpose of arousing or gratifying the sexual desire of the person, to wit: human/genital to animal/genital contact, human/oral to animal/genital contact, animal/oral to human/genital contact, human/genital to animal/anal contact, animal/genital to human/anal contact, human/oral to animal/anal contact.
- C. Photographs, negatives, slides, video cassettes, or any other photographic or video recording medium depicting the suspect /suspects, in an act of sexual assault upon an animal protected by Penal Code Section 597f, as described in Penal Code Section 286.5, possessed or possessed with the intent to distribute or exhibit toothers, any obscene matter.
- D. Exposed but undeveloped rolls of film.
- E. Papers, letters, forms, envelopes, lists, records, journals, address books and writings as that term is defined in the California Penal Code, bearing the name KENNETH N. WALTON and/or JEAN A. WALTON.
- F. Papers, letters, forms, envelopes, lists, and records, journals, address books and writings as that term is

defined in the California Penal Code, bearing the names or addresses of persons and indicating a sexual interest in the sexual assault of animals, as described in Penal Code Section 286.5.

- G. Documents and effects tending to show dominion and control over said premises with the contents thereof including rental agreements, rent receipts, keys and photographs which depict persons and any portions of the residence at 1039———Hoover [H.E.] St., Escondido, California, and federal tax forms.

3. I believe there is substantial probable cause to search the described premises for the following items of personal property and evidence, within the meaning of penal code section 1524, which are sometimes referred to hereafter collectively as "the property" or "the described property".

If you find the described property, or any part thereof, you are commanded pursuant to Penal Code section 1536 to retain it in your custody pending further order of this court or any court hearing proceedings in which the seized property is evidence.

Given under my hand and dated this 1st day of May, 1986.

[Original signed: Harley Earwicker]

JUDGE OF THE MUNICIPAL COURT

CERTIFICATE OF SERVICE BY MAIL

KENNETH WALTON and JEAN WALTON,
Petitioners,
v.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

State of California)
City and County of San Diego)
SS.
PETER C. LEHMAN, a member of the Bar of the Supreme
Court of the United States, being duly sworn, deposes and states:
That his business address is 101 West Broadway in the
City and County of San Diego, State of California Since he will
be out of the country when the printing of the brief is accom-
plished, that on July 7, 1987, he instructed his secretary to
mail true copies as soon as prepared of the attached Brief of
Respondent in Opposition in the above-entitled matter to counsel
of record by placing same in envelopes addressed as follows:

Supreme Court of California
455 Golden Gate Avenue
San Francisco, CA 94102

Clerk of the Superior Court
Appellate Department
220 West Broadway
San Diego, CA 92101

Municipal Court of San Diego
Judicial District, North County
325 S. Melrose Drive
Vista, CA 92083

Clerk of the Court
California Court of Appeal
Fourth Appellate District
Division One
1350 Front Street, Rm 6010
San Diego, CA 92101

Office of Attorney General
110 West A Street, S. 700
San Diego, CA 92101

Thomas F. Homann, Esq.
432 F Street, Suite 204
San Diego, CA 92101

Subscribed and sworn to before
me this 7th day of July, 1987

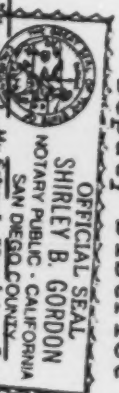
Kenneth Walton
NOTARY PUBLIC IN AND FOR THE CITY
AND COUNTY OF SAN DIEGO, CALIFORNIA

Said envelopes were sealed and deposited in the United States
Mail on July 20, 1987, at San Diego, California, with first class
postage thereon fully prepaid.

Subscribed and sworn to before
me this 20 day of July, 1987

Shirley B. Gordon
NOTARY PUBLIC IN AND FOR THE CITY
AND COUNTY OF SAN DIEGO, CALIFORNIA

Signed *Peter C. Lehman*
PETER C. LEHMAN
Deputy District Attorney



Signed *Shirley B. Gordon*
Secretary

